84-1187

Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE MEDICAL and DENTAL STAFF
OF YORK HOSPITAL,

Petitioner,

v.

MALCOLM WEISS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:
KOHN, SAVETT,
MARION & GRAF, P.C.
1700 Market Street
Philadelphia, PA 19103
(215) 665-9900

KAIN, BROWN & ROBERTS
119 East Market Street
York, PA 17401
(717) 843-8968

Frederic L. Ballard
Morris Cheston, Jr.
Arthur Makadon
Helen P. Pudlin*
David L. Cohen
BALLARD, SPAHR,
ANDREWS & INGERSOLL
30 South 17th Street
Philadelphia, PA 19103
(215) 564-1800

Attorneys for Petitioner
**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

21pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a hospital medical staff, in discharging its legally mandated staff privileges functions, automatically a "combination" subject to scrutiny under section 1 of the Sherman Act?

2. Can a hospital medical staff's professional evaluation of, and recommendation to deny, a physician's application for staff privileges be deemed a per se illegal group boycott, when there has been no analysis of the nature, purpose, or effect of the alleged restraint?

3. Can a plaintiff establish antitrust jurisdiction and a violation of Sherman Act section 1 when there is no evidence that the alleged antitrust violation substantially affected interstate commerce?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutory Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	12
I. This case presents certain questions respecting administration of the antitrust laws which are before this Court in *Northwest Wholesale Stationers, Inc.*	12
II. The decision of the court of appeals has drastic implications for hospitals seeking to provide cost-effective, high quality patient care	13
A. Increase in costs	14
B. Decrease in quality of care	16
III. The decision of the court of appeals is wrong as a matter of law	18
A. The conclusion that the York Medical Staff necessarily is a "combination" under Sherman Act section 1 is contrary to decisions of this Court and other courts of appeals	18
1. The physician members of the York Medical Staff when performing credentialing functions are agents of York Hospital and cannot be presumed to be antitrust conspirators	19

TABLE OF CONTENTS—*(Continued)*

Page

2. Credentialing decisions are made unilaterally by hospital boards of directors. . . 21

B. The decision of the court of appeals to apply a per se rule to a hospital's credentialing process is contrary to decisions of this Court and other courts of appeals. 22

1. Credentialing activities are not group boycotts. 23

2. The court of appeals' new per se rule was unsupported by any economic analysis. . 23

3. The existence of procompetitive justifications compels rejection of the per se standard. 25

4. Credentialing activities are a form of industry self-regulation. 26

C. The decision of the court of appeals that there was a substantial and adverse effect on interstate commerce is in direct conflict with decisions of other courts of appeals and is unjustifiable on the record. 27

1. The circuit conflict. 28

2. Absence of effect on interstate commerce. 29

Conclusion 30

APPENDIX

Appendix A (Opinion of Court of Appeals) A-1

Appendix B (Opinion of District Court). A-97

TABLE OF CONTENTS—*(Continued)*

Page

Appendix C (Order of Court of Appeals Staying Issuance of its Mandate) A-124

Appendix D (Order of Court of Appeals Staying the Effectiveness of the District Court Injunction) . . A-125

Appendix E (Judgment of Court of Appeals) A-127

Appendix F (Order of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing In Banc) A-132

Appendix G (Excerpts of Federal Medicare Regulations) A-134

Appendix H (Excerpts of Joint Commission on Accreditation of Hospitals Governing Body and Medical Staff Standards) A-142

Appendix I (Excerpts of Pennsylvania Health Regulations) A-152

Appendix J (Summary of State Regulation of Hospital Medical Staffs) A-163

TABLE OF AUTHORITIES

Cases:	Page
Associated Press v. United States, 326 U.S. 1 (1945)	20
Belmar v. Cipolla, 96 N.J. 199, 475 A.2d 533 (1984).	12
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)	22, 24, 25
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	21
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	22
Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984)	19
Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36 (1st Cir. 1981)	28
Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1981) (*en banc*)	28
Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346 (7th Cir. 1982)	3
Early v. Bristol Memorial Hospital, Inc., 508 F. Supp. 35 (E.D. Tenn. 1980)	18
Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)	22
Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (1st Cir. 1980)	30
Everhart v. Jane C. Stormont Hospital & Training School for Nurses, 1982-1 Trade Cas. (CCH) ¶ 64,703 (D. Kan. 1982)	3

Cases: Page

Feldman v. Jackson Memorial Hospital, 571 F. Supp. 1000 (S.D. Fla. 1983) 3

Furlong v. Long Island College Hospital, 710 F.2d 922 (2d Cir. 1983) 28, 29

Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974) 19

Hayden v. Bracy, 744 F.2d 1338 (8th Cir. 1984) 28

Hoffman v. Delta Dental Plan of Minnesota, 517 F. Supp. 564 (D. Minn. 1981) 3

Hoover v. Ronwin, 104 S. Ct. 1989 (1984) 21

Hospital Building Co. v. Trustees of the Rex Hospital, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 104 S. Ct. 231, 259 (1983) 3

Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984) 3, 12, 27

Johnston v. Baker, 445 F.2d 424 (3d Cir. 1971) 19

Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984) 3

M&H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984) 13

Marrese v. Interqual, Inc., 748 F.2d 373 (7th Cir. 1984) 15, 16, 17, 18, 21

McElhinney v. Medical Protective Co., 549 F. Supp. 121 (E.D. Ky. 1982), *rev'd on other grounds*, 1984-1 Trade Cas. (CCH) ¶ 66,054 (6th Cir. 1984) 3, 28

McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980) 28, 29

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

McMorris v. Williamsport Hospital, 1984-2 Trade Cas. (CCH) ¶ 66,252 (M.D. Pa. 1984) 20

Moles v. Morton F. Plant Hospital, Inc., 1980-81 Trade Cas. (CCH) ¶ 63,600 (M.D. Fla. 1978), *aff'd mem.* 617 F.2d 293 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980) 14, 20

Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) 12, 22

National Collegiate Athletic Ass'n. v. Board of Regents of the University of Oklahoma, 104 S. Ct. 2948 (1984) 24, 27

National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378 (1981) 25

Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958) 23

Out Front Productions, Inc. v. Magid, 748 F.2d 166 (3d Cir. 1984) 26

Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc., 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984) 13, 23, 26

Parker v. Brown, 317 U.S. 341 (1943) 21

Pontius v. Children's Hospital, 552 F. Supp. 1352 (W.D. Pa. 1982) 14, 17, 18

Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos., 682 F.2d 660 (7th Cir. 1982) 27

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 27

Cases: Page

Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.* 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982) 3, 15

Seglin v. Esau, 1984-1 Trade Cas. (CCH) ¶ 65,835 (N.D. Ill. 1984) 20

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 13, 20, 26

Sokol v. University Hospital, Inc., 402 F. Supp. 1029 (D. Mass. 1975) 20

Sosa v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971) 17

Stone v. William Beaumont Hospital, 1983-2 Trade Cas. (CCH) ¶ 65,681 (E.D. Mich. 1983) 14, 20

Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648 (7th Cir. 1984) 15

United States v. Colgate & Co., 250 U.S. 300 (1919). 22

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 22

Vuciecevic v. MacNeal Memorial Hospital, 572 F. Supp. 1424 (N.D. Ill. 1983) 3, 26

Weiss v. York Hospital, 548 F. Supp. 1048 (M.D. Pa. 1982) ..... *passim*

Weiss v. York Hospital, 745 F.2d 786 (3d Cir. 1984) ..... *passim*

Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980) 28

Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 2398, 2399 (1984) 3, 26

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Williams v. Kleaveland, 534 F. Supp. 912 (W.D. Mich. 1981) 3

Williams v. Kleaveland, 1983-2 Trade Cas. (CCH) ¶ 65,486 (W.D. Mich. 1983) 14

Statutes:

15 U.S.C. § 1 ..... *passim*

28 U.S.C.:

§ 1254(1) 2
§ 1331 3
§ 1337 3

42 U.S.C.:

§ 1320c to 1320c-12 17
§ 1395x 17
§ 1396a 17

Pa. Stat. Ann. tit. 63, §§ 425.1-425.4 (Purdon Supp. 1984) 17, 21

Rules and Regulations:

42 C.F.R.:

§ 405.1011 9
§ 405.1020 9
§ 405.1021 ..... 7, 8
§ 405.1023 ..... 7, 8

28 Pa. Code:

pt. IV 21
§ 101.4 8
§ 101.31 7
§ 101.81 9
§ 101.141 9
§ 101.142 9

TABLE OF AUTHORITIES—*(Continued)*

Rules and Regulations: Page

28 Pa. Code:

§ 103.1 9
§ 103.3 ..... 8, 9
§ 103.4 ..... 8, 9
§ 107.1 ..... 7, 8
§ 107.2 ..... 8, 9
§ 107.5 ..... 8, 9
§ 107.12 ..... 8, 9
§ 107.26 8

Supreme Court Rules:

R. 19.6 2
R. 21.1(b) 2

Other Authorities:

American Hospital Association, *An Analysis of the Revised Medical Staff Standards of the Joint Commission on Accreditation of Hospitals* (1984) 16

American Osteopathic Association, *Accreditation Requirements of the American Osteopathic Association* (1978) 4

American Osteopathic Association, *Yearbook and Directory of Osteopathic Physicians* (75th ed. 1983-84) 4

Drake & Kozak, *A Primer on Antitrust and Hospital Regulation*, 3 J. of Health Pol., Pol'y & L. 328 (1978) 25

Drexel, *The Antitrust Implications of the Denial of Hospital Staff Privileges*, 36 U. Miami L. Rev. 207 (1982) 27

Gibson, Waldo & Levit, *National Health Expenditures, 1982*, 5 Heath Care Financing Rev. 1 (1983).... 9

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1983) 21

Institute of Medicine, *The New Health Care for Profit: Doctors and Hospitals in a Competitive Environment* (1983) 17

Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* (Governing Body and Medical Staff Standards) 7, 8, 9

Levin, *Doctors Sue Hospitals For Staff Privileges As Competition Rises*, Wall St. J., Sept. 29, 1981, at 1, col. 1 15

Robert Wood Johnson Foundation, *Medical Practice in the United States* (1981) 20

S. Rep. No. 93-1285 (1974) 25

United States Department of Commerce, *Statistical Abstract of the United States: 1984* (104th ed. 1983) 14

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE MEDICAL and DENTAL STAFF
OF YORK HOSPITAL,

Petitioner,

v.

MALCOLM WEISS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Medical and Dental Staff of York Hospital (the "York Medical Staff"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on September 27, 1984.[1]

---

1. The York Medical Staff is now known as The Medical Staff of York Hospital. Other than the parties listed in the caption herein, York Hospital and ten individual physicians (S. Philip Laucks, M.D., Howard H. MacDougall, M.D., Iain L. MacKenzie, M.D., John P. Whitely, M.D., S. W. Deisher, M.D., Jack A. Kline, M.D., Lois M. Kushner, M.D., Ivan L. Butler, M.D., Gary Ardison, M.D., and Thomas L. Bauer, M.D.) were also defendants in the

OPINIONS BELOW

The opinion of the court of appeals, reported at 745 F.2d 786, appears in Appendix A, *infra* pp. A-1 to A-96. The opinion of the district court, reported at 548 F. Supp. 1048, appears in Appendix B, *infra* pp. A-97 to A-123.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit were entered on September 27, 1984. (Appendix A, *infra* pp. A-1 to A-96; Appendix E, *infra* pp. A-127 to A-131). Petitioner's timely petition for rehearing and suggestion for rehearing in banc was denied on October 25, 1984 (Appendix F, *infra* pp. A-132 to A-133), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 15:

> **§ 1. Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

NOTES *(Continued)*

action below. *See* Supreme Court Rule 21.1(b). Because York Hospital and the ten individual defendants were exonerated from any antitrust liability, they are not parties to this petition. *See* Supreme Court Rule 19.6.

STATEMENT OF THE CASE

I. Preliminary.

This is the first case to apply a per se liability rule in the hospital staff privileges context. It is the first case to hold that, as a matter of law, any action by a hospital medical staff constitutes a combination or conspiracy under section 1 of the Sherman Act. It is also the first case in which any court has decided, under any theory, that a hospital staff privileges decision is a violation of section 1 of the Sherman Act.[2]

II. Nature of the case.

Respondent Malcolm Weiss ("Weiss"), a doctor of osteopathy, filed this antitrust action on behalf of himself and a class of the 92 other osteopathic physicians practicing in and around York, Pennsylvania. Weiss sought treble damages and injunctive relief against York Hospital, the York Medical Staff, and ten individual physician members of the York Medical Staff, charging defendants with conspiring to deny osteopaths admission to the York Medical Staff and refusing to deal with Weiss and the class in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

2. All other courts which have assessed the propriety of staff privileges determinations have applied a rule of reason analysis and, under that analysis, have found no antitrust violation. *E.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984); *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982); *Vuciecevic v. MacNeal Memorial Hospital*, 572 F. Supp. 1424 (N.D. Ill. 1983); *Feldman v. Jackson Memorial Hospital*, 571 F. Supp. 1000 (S.D. Fla. 1983); *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121 (E.D. Ky. 1982), *rev'd on other grounds*, 1984-1 Trade Cas. (CCH) ¶ 66,054 (6th Cir. 1984); *Everhart v. Jane C. Stormont Hospital & Training School for Nurses*, 1982-1 Trade Cas. (CCH) ¶ 64,703 (D. Kan. 1982); *Williams v. Kleaveland*, 534 F. Supp. 912 (W.D. Mich. 1981); *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.* 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982). *See also Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984); *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398, 2399 (1984); *Hospital Building Co. v. Trustees of the Rex Hospital*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 104 S. Ct. 231, 259 (1983); *Hoffman v. Delta Dental Plan of Minnesota*, 517 F. Supp. 564 (D. Minn. 1981).

3. The district court had jurisdiction over Weiss's antitrust claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

At issue was the alleged discriminatory manner in which defendants treated staff privileges applications submitted by osteopathic physicians. According to Weiss, this alleged discrimination resulted in the denial of his application for staff privileges. (The six other osteopaths who had completed their applications by the time of trial were all granted staff privileges.) It was the treatment and denial of Weiss's application that formed the sole basis for the injunctive relief entered by the district court in favor of Weiss and the class.

York Hospital and the ten individual physician defendants were exonerated from antitrust liability, leaving the York Medical Staff as the only party to the Sherman Act section 1 conspiracy.[4]

III. Factual background.

A. The treatment by York Hospital of osteopaths' applications for staff privileges.

Osteopathic (D.O.) and allopathic (M.D.) physicians have been separately schooled and licensed by the Commonwealth of Pennsylvania and other states. *See Weiss v. York Hospital*, 745 F.2d 786, 791-92 nn.1-4 (3d Cir. 1984) (Appendix A, *infra* pp. A-4 to A-6); American Osteopathic Association, *Yearbook and Directory of Osteopathic Physicians* 473 *et seq.* (75th ed. 1983-84); 3453a; 3806a-3808a.[5] In many communities, including York, osteopaths and allopaths traditionally maintained separate hospitals and the barriers separating the two schools of practice were mutual. *See Weiss*, 745 F.2d at 793 (Appendix A, *infra* p. A-9); 3453a. *See generally* American Osteopathic Association, *Accred-*

4. In processing Weiss's staff privileges application, the York Medical Staff acted through four of its committees (the Family Practice Department Credentials Committee, the Medical Staff Credentials Committee, the Medical Staff Executive Committee, and a Judicial Review Committee). Only the Executive Committee and the Judicial Review Committee recommended denial of Weiss's application. The ten individual physician defendants were the members of those two committees.

5. References in this form are to pages in the Joint Appendix filed in the court of appeals.

itation Requirements of the American Osteopathic Association 1, *passim* (1978).

As the differences in the schooling and training of osteopaths and allopaths narrowed, some hospitals that formerly had only allopaths on their medical staffs took steps to integrate the two types of practitioners. (3453a, 3630a-3631a). As part of this trend, York Hospital in 1974 voluntarily amended its corporate charter to permit osteopaths to obtain staff privileges. (3810a-3811a). In 1976, the York Medical Staff similarly amended its bylaws. (3813a-3814a; 4024a-4025a).

Weiss and Michael Zittle, D.O. ("Zittle") were the first two osteopaths to seek staff privileges at York Hospital, both applying in 1976. Although these initial osteopathic applications were processed more carefully than applications by allopaths, this "caution" (4162a) (or, according to Weiss, "discrimination") was dictated by York Hospital's and the York Medical Staff's relative unfamiliarity with the educational and training backgrounds of osteopathic applicants and their references. As Merle S. Bacastow, M.D., Vice-President of Medical Affairs at York Hospital and the official responsible for processing applications for staff privileges, explained at trial:

> [A]dmitting osteopathic physicians to the York Hospital medical staff was a new venture . . . . We were going to be admitting additional osteopathic physicians to the staff and we were using new resources of information.
>
> I was unfamiliar with the osteopathic schools in some of these specifics. I was unfamiliar with osteopathic hospitals generally. I was unfamiliar with many of the people who would be serving as referral information.

(5240a-5241a).

Within this framework, Weiss's application was considered.[6] (1542a-1555a). References were gathered, and information crit-

6. York Hospital's consideration of Weiss's application included all the due process protections normally accorded applications for staff privileges at York Hospital, including numerous meetings at which Weiss and/or his legal counsel were present and participated and at which numerous votes were taken. *See Weiss*, 745 F.2d at 796-99. (Appendix A, *infra* pp. A-15 to A-22).

ical of Weiss's medical competence and ability to work with others in a hospital setting was received from osteopaths and allopaths. For example, Kenneth F. Woerthwein, M.D., wrote that Weiss's patients complained about his medical treatment and that Woerthwein "would have strong concern regarding his [Weiss's] medical abilities and competence." (5911a). And Roy O. Kammer, D.O., a fellow osteopath, wrote in his reference letter:

> I have known Dr. Malcolm Weiss for four years. He was not popular during his internship and seemed to perform his duties grudgingly.
>
> There was ambivalence concerning his staff membership at Memorial Osteopathic Hospital [the osteopathic hospital in York] and it took three meetings and much debate before his acceptance. . . .
>
> He served as a paid member of the Emergency Room Staff. He related so badly to people of the lower socioeconomic class that on occasion he was physically attacked by patients and family members. He demanded police protection or the right to arm himself. The administration felt this lack of rapport was his fault and terminated his contract.

(5909a-5910a).

In view of these critical comments and others, and taking into account the negative recommendation of the York Medical Staff, York Hospital's lay Board of Directors unanimously voted to deny Weiss's application for staff privileges because of the Board's concerns about Weiss's "uncooperative nature" and about the adverse impact his appointment would have on the quality of patient care at York Hospital. (1691a-1693a). As Donn I. Cohen, Esquire, then chairman of York Hospital's Board of Directors, explained in his deposition testimony:

> There were concerns expressed apparently in terms of patient care, quality, and also in terms of the impact of Dr. Weiss on the operations of the hospital and, in turn, how that would affect the quality and efficacy of the care of patients. . . .

. . . .

. . . And our concern is not only with fairness to Dr. Weiss, albeit that's a major concern and an important concern. Our concern is also with patient care and the impact of his admission to the hospital's attending staff on the quality of care at the hospital.

(2067a; 2091a).

Staff privileges were granted to Zittle on the same day Weiss's application was denied. Including Weiss and Zittle, until the time of trial in this case, seven osteopaths had completed applications for staff privileges at York Hospital; six were accepted, while only Weiss was turned down. *Weiss v. York Hospital*, 548 F. Supp. 1048, 1053 (M.D. Pa. 1982) (Findings of Fact Nos. 36-40). (Appendix B, *infra* pp. A-102 to A-103).

B. The organization, purpose, and operation of the York Medical Staff.

Federal regulations, national accreditation organization standards, and state regulatory schemes in 49 states, including Pennsylvania, and the District of Columbia require hospitals to have organized medical staffs like the York Medical Staff. *See* 42 C.F.R. §§ 405.1021(a)(2)(v), 405.1021(e), 405.1023 (1984) (Appendix G, *infra* pp. A-136 to A-137); Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* (Governing Body and Medical Staff Standards) (hereinafter cited as *"JCAH Manual"*) (Appendix H, *infra* pp. A-142, A-145); 28 Pa. Code §§ 101.31(3), 107.1 (1984) (Appendix I, *infra* pp. A-153, A-158); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs). These regulatory provisions also require physicians authorized to care for hospital patients on a regular basis to be members of the hospital medical staff.

Medical staffs are required by law and national accreditation organization standards to be organized to serve the interests of the hospital and its patient population. Hospital boards of directors are compelled to delegate certain hospital functions to medical staffs and the medical staffs are required to be accountable to the hospital board of directors and to be part of the overall hos-

pital organization.[7] *See* 42 C.F.R. §§ 405.1021(d), 405.1023 (1984) (Appendix G, *infra* pp. A-136 to A-141); *JCAH Manual, supra* p. 7 (Appendix H, *infra* pp. A-142 to A-151); 28 Pa. Code §§ 101.4, 103.3, 103.4, 107.1, 107.5, 107.12(13) (1984) (Appendix I, *infra* pp. A-153, A-155 to A-162); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs).

One of the functions required of the medical staff, and for which the medical staff is accountable to the hospital board of directors, is participation (through the medical staff's individual physician members)[8] in the staff privileges decision-making process.[9] *See* 42 C.F.R. §§ 405.1023(d), 405.1023(e), 405.1023(l) (1984) (Appendix G, *infra* pp. A-138 to A-140); *JCAH Manual, supra* p. 7 (Appendix H, *infra* pp. A-142 to A-143, A-146 to A-151); 28 Pa. Code §§ 103.4.(9), 107.2, 107.5, 107.12 (1984) (Appendix I, *infra* pp. A-157 to A-162); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs). Federal regulations, national accreditation organization standards, and state regulatory schemes in at least 43 states, including Pennsylvania, thus require medical staffs to advise, and make recommendations to, the hospital board of directors respecting the board's staff privileges decisions.

The ultimate authority and responsibility for all hospital staff privileges decisions is vested with the hospital board of directors pursuant to law and national accreditation organization standards. *See* 42 C.F.R. §§ 405.1021, 405.1021(e), 405.1023, 405.1023(d), 405.1023(e), 405.1023(m) (1984) (Appendix G, *infra*

7. The York Medical Staff Bylaws similarly provide that the purpose of the York Medical Staff is to foster the interests of York Hospital and the community it serves. (1559a-1560a).

8. The participation of individual physician members of the medical staff in hospital staff privileges decisions is mandated by law and national accreditation organization standards. *See* 42 C.F.R. §§ 405.1023(e), 405.1023(l) (1984) (Appendix G, *infra* pp. A-138 to A-140); *JCAH Manual, supra* p. 7 (Appendix H, *infra* pp. A-147 to A-151); 28 Pa. Code § 107.26 (1984) (Appendix I, *infra* p. A-162).

9. Staff privileges decisions (which are also referred to in this petition as credentialing decisions) include decisions granting, limiting, and terminating staff privileges, thereby determining whether a physician will be permitted to admit and treat patients in the hospital.

pp. A-135 to A-141); *JCAH Manual*, *supra* p. 7 (Appendix H, *infra* pp. A-142 to A-151); 28 Pa. Code §§ 103.1, 103.3(8), 103.4, 107.2, 107.5, 107.12(13) (1984) (Appendix I, *infra* pp. A-155 to A-162); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs).[10]

Consistent with this legally mandated structure of staff privileges decision-making (and the York Medical Staff Bylaws),[11] the York Medical Staff processed Weiss's application for staff privileges and, ultimately, through its Executive Committee and a Judicial Review Committee, recommended to York Hospital's lay Board of Directors that Weiss's application be denied. After reviewing the York Medical Staff's recommendation, the Board made the decision to deny Weiss's application. *See Weiss*, 745 F.2d at 797-99. (Appendix A, *infra* pp. A-16 to A-22).

IV. Conclusions of the courts below.

A. The district court.

Following a bifurcated jury trial on liability and a hearing on equitable relief, the district court entered its opinion, order, and judgment. (These are reported at 548 F. Supp. 1048 and reproduced in Appendix B, *infra* pp. A-97 to A-123.) The district court concluded that the York Medical Staff alone was liable to the class (but not Weiss)[12] under section 1 of the Sherman Act and the court entered injunctive relief in favor of the class.

10. Hospitals have no choice but to follow all of these regulatory requirements. Failure to comply can lead to a cutoff of all governmental funds. *See, e.g.*, 42 C.F.R. §§ 405.1011, 405.1020 (1984) (Appendix G, *infra* pp. A-134 to A-135); 28 Pa. Code §§ 101.81, 101.141, 101.142 (1984) (Appendix I, *infra* p. A-154). Such a cutoff of funds would be disastrous for most hospitals, as more than half of all hospital costs are paid by governmental entities. *See* Gibson, Waldo & Levit, *National Health Expenditures, 1982*, 5 Health Care Financing Rev. 1, 19 (1983).

11. The York Medical Staff Bylaws provide that the Staff's Credentials Committee, Executive Committee, and Judicial Review Committee are to review staff privileges applications and to recommend action to the York Hospital Board of Directors, which is to make the "definitive" decision. (1562a-1563a).

12. The absence of any Sherman Act section 1 liability to Weiss was based upon the jury's finding that any conspiracy to deny Weiss staff privileges did not "constitute an unreasonable restraint upon interstate commerce." Jury's Response to Special Verdict Question No. 8. (6244a).

The district court held the York Medical Staff liable to the class on the basis of the jury's answers to Special Verdict Questions Nos. 11 (6247a) and 13 (6250a):

> 11. Did any of the Defendants conspire with any other person or persons, entity or entities, whether or not a Defendant, to deny or impede reasonable, fair, equal or full access to staff privileges at York Hospital by osteopathic physicians other than Plaintiff Weiss?
>
> Answer: Yes X
> No ____
>
> . . . .
>
> 13. If your answer to the previous question is "yes," check the name or names of the Defendants listed below who were involved in that conspiracy.
>
> | | |
> |---|---|
> | York Hospital | ____ |
> | York Hospital Medical and Dental Staff | X |
> | Gary Ardison, M.D. | ____ |
> | Thomas L. Bauer, M.D. | ____ |
> | Ivan L. Butler, M.D. | ____ |
> | S.W. Deisher, M.D. | ____ |
> | Jack A. Kline, M.D. | ____ |
> | Lois Kushner, M.D. | ____ |
> | S. Philip Laucks, M.D. | ____ |
> | Harold H. MacDougall, M.D. | ____ |
> | Iain L. MacKenzie, M.D. | ____ |
> | John P. Whiteley, M.D. | ____ |

B. The court of appeals.

On September 27, 1984, a two-judge panel[13] of the United States Court of Appeals for the Third Circuit affirmed the entry of an injunction in favor of the class (including Weiss as a member of the class) and against the York Medical Staff under section 1 of the Sherman Act. (The court of appeals' opinion is reported

13. One of the three original members of the panel, Circuit Judge Adams, recused after oral argument and did not participate in the decision.

at 745 F.2d 786 and reproduced in Appendix A, *infra* pp. A-1 to A-96.)[14]

With respect to conspiracy, the court of appeals agreed with the district court that the York Medical Staff and York Hospital were a single entity incapable of conspiring with each other for purposes of Sherman Act section 1. *Weiss*, 745 F.2d at 816-17. (Appendix A, *infra* pp. A-62 to A-63). The court of appeals also found an "absence of evidence" of any co-conspirators who might have acted in concert with the York Medical Staff. *Id.* at 814. (Appendix A, *infra* p. A-58).

Nonetheless, the court of appeals labeled this heretofore fatal defect "irrelevant," holding that "as a matter of law, the medical staff is a combination of individual doctors and therefore . . . any action taken by the medical staff satisfies the 'contract, combination, or conspiracy' requirement of section 1." *Id.* The court thus determined that the York Medical Staff (and, *a priori*, the medical staff of every other hospital in the United States) is necessarily a combination "subject to scrutiny under section 1 of the Sherman Act." *Id.* at 816. (Appendix A, *infra* p. A-61).

The court's conclusion was not based upon any finding or evidence that, in their credentialing capacity, the York Medical Staff or any of its individual members acted otherwise than in the interests of York Hospital. Indeed, in response to the district court's instruction that the ten individual York Medical Staff members were legally capable of conspiring if they took action against the class "in whole or in part in their individual capacities and motivated in whole or in part by independent personal economic interests" (5686a), the jury found that none of the individual defendants conspired against the class.

Having posited a Sherman Act section 1 conspiracy, the court of appeals then held that, although staff privileges had been granted to all osteopaths (other than Weiss) who had completed their applications, and notwithstanding the legitimate question about Weiss's qualifications for staff membership, the discrimi-

14. After issuing its opinion, the court of appeals both stayed the issuance of its mandate (Appendix C, *infra* p. A-124) and stayed the effectiveness of the district court's injunction (Appendix D, *infra* pp. A-125 to A-126) pending this Court's review of this petition.

nation at issue was "the equivalent of a concerted refusal to deal" or group boycott and was consequently per se illegal under Sherman Act section 1. *Weiss*, 745 F.2d at 818, 821. (Appendix A, *infra* pp. A-67, A-74).

In reaching for this conclusion, the court of appeals acknowledged that "the facts of this case do not precisely fit into the mold of the classical refusal to deal" and that arguably "what is at issue is not a boycott but mere discrimination, which sounds less like a *per se* antitrust violation." *Id.* at 819-20. (Appendix A, *infra* p. A-69). The court of appeals nevertheless resorted to the mechanistic application of the "group boycott" label and the conclusory statement that group boycotts are "plainly anticompetitive." *Id.* at 820. (Appendix A, *infra* p. A-70).

The court of appeals did not undertake any analysis of any anticompetitive purposes or effects of the alleged antitrust restraint. The court did not evaluate the distinctions between the health care industry (particularly nonprofit hospitals) and the industries in which the per se rule against group boycotts is traditionally applied.[15] Nor did the court recognize the procompetitive justifications for the alleged discrimination.[16]

REASONS FOR GRANTING THE WRIT

I. This case presents certain questions respecting administration of the antitrust laws which are before this Court in *Northwest Wholesale Stationers, Inc.*

The court of appeals' unwarranted extension of the limits of antitrust liability occurs at a time when, rather than charting new frontiers of antitrust exposure, this Court and other courts of appeals have expressed concern with the scope of existing theories of antitrust liability. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984); *Monsanto Co. v.*

15. As one court has put it, "a hospital is a complex business vitally affected with a public interest." *Belmar v. Cipolla*, 96 N.J. 199, 207, 475 A.2d 533, 537 (1984).

16. The court of appeals incongruously left for the damage phase of the trial the defenses of Weiss's and the class's lack of professional capacity or unprofessional conduct. *Weiss*, 745 F.2d at 821-22. (Appendix A, *infra* pp. A-73 to A-74).

Spray-Rite Service Corp., 104 S. Ct. 1464 (1984); *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984). The court of appeals' expansive decision has serious jurisprudential ramifications, certain of which this Court recognized when it decided to review *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984).

In *Northwest Wholesale Stationers, Inc.*, the court of appeals, relying in part on *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), held that a member of a cooperative association who was expelled without due process protections, was the subject of a group boycott that was per se illegal under section 1 of the Sherman Act. This Court granted certiorari to review, *inter alia*, whether a finding of a per se violation of the antitrust laws could be made without a minimum scrutiny of the purpose and effect of the alleged restraint.

In this case, as in *Northwest Wholesale Stationers, Inc.*, the court of appeals adopted and applied a per se liability rule without any analysis of the purpose or effect of the alleged restraint. The court here went even further than the Ninth Circuit in *Northwest Wholesale Stationers, Inc.*, by concluding that the York Medical Staff was a section 1 combination without any finding or showing that the York Medical Staff or any of its members acted otherwise than in the interests of York Hospital.[17]

II. The decision of the court of appeals has drastic implications for hospitals seeking to provide cost-effective, high quality patient care.

More is at stake in this case than the rights and interests of the litigants. Although this is a lawsuit concerning a single hospital in central Pennsylvania, the court of appeals' adoption of a "double per se" analysis — that is, first, to rule as a matter of law

17. Insofar as this Court's review of *Northwest Wholesale Stationers, Inc.*, focuses on whether self-regulatory activities by associations that might be condemned as per se illegal group boycotts in other contexts should be assessed under the rule of reason, this case also presents issues similar to those that the Court will be deciding in *Northwest Wholesale Stationers, Inc.* *See infra* pp. 26-27.

that medical staffs are "combinations" under the antitrust laws and, next, to superimpose thereon the "group boycott" label without any analysis of the purpose or effect of the alleged restraint — will profoundly alter the functions, operations, and competitive strategies of the more than 7,000 hospitals in the United States.[18]

No hospital can function efficiently, competently, or competitively when every staff privileges recommendation by its medical staff is reviewable under antitrust standards by a federal jury. By foreclosing the availability of the summary relief that heretofore had provided important protection to hospitals and medical staffs against baseless antitrust claims, and by creating a virtually irrebutable presumption of antitrust liability, the court of appeals has dramatically and adversely affected national health policy in at least the following critical respects:

A. Increase in costs.

To date, courts have refused to apply section 1 of the Sherman Act to staff privileges cases, and defendants in such cases have been able to extricate themselves relatively promptly, in the absence of an affirmative showing by the plaintiff physician of (i) an antitrust conspiracy or combination, and (ii) an unreasonable restraint of trade. *See, e.g., Stone v. William Beaumont Hospital*, 1983-2 Trade Cas. (CCH) ¶ 65,681 (E.D. Mich. 1983); *Williams v. Kleaveland*, 1983-2 Trade Cas. (CCH) ¶ 65,486 (W.D. Mich. 1983); *Pontius v. Children's Hospital*, 552 F. Supp. 1352 (W.D. Pa. 1982); *Moles v. Morton F. Plant Hospital, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,600 (M.D. Fla. 1978), *aff'd mem.* 617 F.2d 293 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

By eliminating the need to prove concerted action and an unreasonable restraint of trade, the court of appeals has foreclosed summary disposition to defendants in cases challenging staff privileges decisions and has unwittingly provided every phy-

18. The American hospital system is dominated by nonprofit/governmental providers. Thus, in 1981, there were a total of 7,027 hospitals in the United States, of which 86.5 percent were either nonprofit (like York Hospital) or government controlled. United States Department of Commerce, *Statistical Abstract of the United States: 1984* 112 (104th ed. 1983).

sician aggrieved by a staff privileges decision with the certain knowledge that all staff privileges disputes can be heard as an antitrust case by a federal jury. The court of appeals' decision thus demonstrates a complete disregard of the "heavy costs of federal litigation, especially antitrust litigation,"[19] *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984), and of the impact of these substantial non-health care costs on the ability of nonprofit hospitals to provide quality health care, to augment revenues through voluntary contributions and other fund raising efforts, and to avoid "increased medical costs to the consumer." *Marrese v. Interqual, Inc.*, 748 F.2d 373, 394 (7th Cir. 1984).

A recent survey by the American Hospital Association underscores the national implications of the issues raised in this petition.[20] Each hospital surveyed received an average of 15.8 applications for staff privileges during 1981, and each rejected an average of 1.3 applications. On a national basis, this projects out to more than 9,000 applications for staff privileges being rejected in the United States in 1981.

Even before the decision in this case, the federal courts were ensnarled in a "deluge" of antitrust litigation brought by ostensibly aggrieved physicians challenging staff privileges determinations. *Marrese*, 748 F.2d at 381. The court of appeals' decision now makes such litigation irresistably inviting to even more of the thousands of physicians whose applications for staff privileges

---

19. Even *winning* an antitrust suit challenging the denial of staff privileges can be prohibitively expensive. For example, in the case of *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.* 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982), Allegheny General Hospital was forced to expend in excess of $2 million to defeat a single cardiothoracic surgeon's challenge to the hospital's decision to deny him staff privileges. *See* Levin, *Doctors Sue Hospitals For Staff Privileges As Competition Rises*, Wall St. J., Sept. 29, 1981, at 1, col. 1, 19, col. 2.

20. In September 1982, the American Hospital Association conducted a mail survey of more than 3,000 randomly selected hospitals in the 48 contiguous states and the District of Columbia. The results of the survey were reported in the December 1, 1983 (pp. 80-84) and December 16, 1983 (pp. 91-94) issues of *Hospitals* magazine.

are rejected each year.[21] A ruling by this Court at this time on the issues in this petition, therefore, is essential to assure the effective functioning of hospitals and medical staffs and the orderly consideration and disposition by the lower federal courts of hospital staff privileges cases.

B. Decrease in quality of care.

The *in terrorum* effect of the court of appeals' decision on hospitals, medical staffs, and individual physicians is incalculable.[22] At the very least, by discouraging physicians from participating in the credentialing process and honestly and critically evaluating their peers, the court of appeals' decision threatens the capacity of hospitals to regulate the quality of their medical staffs.

This very point was made by the Seventh Circuit in the most recent court of appeals decision in a hospital staff privileges case:

> It is only logical that physicians . . ., when presented with allegations of Federal antitrust violations and the threat of treble damages, will either dilute their peer review reports and cease recommending the revocation of a hospital staff member's privileges or will discontinue their participation in the state mandated and supervised peer review process. As a result, the very lifeline of the medical peer review process will be severed.

Marrese, 748 F.2d at 391. The Seventh Circuit thus concluded that permitting antitrust scrutiny of hospital credentialing decisions "will destroy the medical peer review process and prevent

21. Expansive application of the antitrust laws in the hospital staff credentialing context is also significant in view of the nationwide movement to admit to hospital staffs various classes of "nonphysician practitioners," including podiatrists, clinical psychologists, nurse midwives, psychiatric social workers, and other allied health professionals. *See* American Hospital Association, *An Analysis of the Revised Medical Staff Standards of the Joint Commission on Accreditation of Hospitals* 1 (1984).

22. The *in terrorum* effect on physicians results from the substantial disruption that inheres in federal antitrust litigation and from the fear of criminal felony sanctions, treble damages, injunctive relief and concomitant contempt threats, and attorneys' fees.

hospitals from fulfilling their duty to provide patients with a competent medical staff." *Id.* at 394.

The court in *Pontius* reached a similar conclusion:

> If a physician, terminated from hospital privileges after receiving due process, is able to force the hospital to assume the burdens of an antitrust trial on the mere allegation that the hospital's decision was grounded on reasons violative of the Sherman Act, the ability of hospitals to regulate their medical staffs will be seriously impaired. Furthermore, if *individual* physicians, who manage to overcome their traditional reluctance to testify about the professional conduct of a colleague, know that by so doing they risk incurring legal fees running into six figures and a trial of a duration measured in months, on the mere allegation that they have conspired to restrain trade, the discovery of incompetent physicians will be rendered extraordinarily difficult.

Pontius, 552 F. Supp. at 1362 (emphasis in original).

By deterring physicians from participating and exercising their expert judgment in the hospital credentialing process, the court of appeals' opinion undermines the national policy favoring meaningful and active physician involvement in that process.[23] As courts have recognized, because "[h]uman lives are at stake," the "evaluation of the professional proficiency of doctors is best left to the specialized expertise of their peers," *Sosa v. Board of Managers of the Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971), and, therefore, physicians must be involved

23. This national policy not only can be found in the federal and state regulatory schemes discussed earlier, *see supra* pp. 7-9, but it also underlies federal and state statutory encouragement and protection of physician peer review proceedings and of the participants in those proceedings. *E.g.*, 42 U.S.C. §§ 1320c to 1320c-12, 1395x(k), 1396a(a)(26); Pa. Stat. Ann. tit. 63, §§ 425.1-425.4 (Purdon Supp. 1984).

This national policy is supported by the recent studies concluding that there is a direct, quantifiable link between active physician involvement in all significant hospital decisions (including credentialing decisions) and cost containment and the quality of patient care at the hospital. *See* Institute of Medicine, *The New Health Care for Profit: Doctors and Hospitals in a Competitive Environment* 90-92 (1983) (citing numerous studies).

in hospital credentialing decisions. *Marrese*, 748 F.2d at 391, 394; *Pontius*, 552 F. Supp. at 1376.[24]

III. The decision of the court of appeals is wrong as a matter of law.

Aside from the implications the court of appeals' decision has for the health care industry, the decision is wrong as a matter of law and seriously affects the administration of the antitrust laws.

A. The conclusion that the York Medical Staff necessarily is a "combination" under Sherman Act section 1 is contrary to decisions of this Court and other courts of appeals.

In light of the "absence of evidence" of any co-conspirators with the York Medical Staff, to find a Sherman Act violation, the court of appeals was forced to decide that the York Medical Staff "as a matter of law" was an antitrust combination satisfying the concerted action requirement of section 1 of the Sherman Act. *Weiss*, 745 F.2d at 814-17. (Appendix A, *infra* pp. A58-A63). This conclusion is legally unsupportable because: (i) it was not premised upon a finding or evidence that the York Medical Staff (or any of its individual members) acted otherwise than in the interests of York Hospital; and (ii) all staff credentialing decisions were made "unilaterally" by York Hospital's lay Board of Directors.

---

24. The consequences discussed *supra* at pages 13 to 18 can be avoided while still affording protection to the physician who wishes to challenge a staff privileges decision. As the courts in *Marrese* and *Pontius* recognized, existing professional standards and state law procedures more than adequately protect the interests of the complaining physician. *Marrese*, 748 F.2d at 393; *Pontius*, 552 F. Supp. at 1376. *See also Early v. Bristol Memorial Hospital, Inc.*, 508 F. Supp. 35, 37 (E.D. Tenn. 1980); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs). Moreover, the existing professional standards and state law procedures are better suited for regulating staff privileges decisions than are the antitrust laws, which were never designed to be applied to such decisions.

1. The physician members of the York Medical Staff when performing credentialing functions are agents of York Hospital and cannot be presumed to be antitrust conspirators.

The court of appeals correctly decided that, in the staff privileges process, the York Medical Staff "operated as an officer of a corporation would in relation to the corporation." *Weiss*, 745 F.2d at 817. (Appendix A, *infra* p. A-63). The court of appeals, accordingly, concluded that York Hospital could not conspire with its own Medical Staff for purposes of section 1 of the Sherman Act. *Id.* (Appendix A, *infra* pp. A-62 to A-63). This conclusion is dictated by this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984), as is the effect of such a holding — that York Hospital and its Medical Staff are a "single enterprise for purposes of § 1 of the Sherman Act." *Id.* at 2742.

In performing credentialing functions, the members of the York Medical Staff are required to have an identity of interest with their "single enterprise" as do corporate officers with their corporation. *See supra* pp. 7-9. This Court has already stated that "officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp.*, 104 S. Ct. at 2741. Accordingly, the members of the York Medical Staff, when engaged in credentialing activities, do not provide the requisite plurality of actors and are, therefore, incapable of concerted action under section 1 of the Sherman Act.

In such a context, for Weiss to have demonstrated concerted action, he would had to have invoked the "independent personal stake" exception and sustained the burden of showing that identifiable individuals had acted for their own interests and outside the interests of York Hospital. *See, e.g., id.* at 2741 n.15; *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); *Johnston v. Baker*, 445 F.2d 424, 426-27 (3d Cir. 1971). Yet, there is no finding or evidence that in the credentialing process any member of the York Medical Staff acted for his or her personal interests and outside the interests of York Hospital. *See Weiss*, 745 F.2d at 813 n.43. (Appendix A, *infra* p.

A-54). Indeed, as to the ten individual defendants, the jury specifically found that they had not acted for their personal interests or in their individual capacities. *See supra* pp. 10-11.

Thus, the court of appeals could not, and did not, rely upon the "individual personal stake" exception, *Weiss*, 745 F.2d at 813 n.43 (Appendix A, *infra* p. A-54), and, under the intra-enterprise conspiracy doctrine, the York Medical Staff could not constitute an antitrust combination. Other courts considering this issue have so concluded. *E.g.*, *McMorris v. Williamsport Hospital*, 1984-2 Trade Cas. (CCH) ¶ 66,252 (M.D. Pa. 1984). *See also Seglin v. Esau*, 1984-1 Trade Cas. (CCH) ¶ 65,835 (N.D. Ill. 1984); *Stone*, 1983-2 Trade Cas. (CCH) at 69,480; *Moles*, 1980-81 Trade Cas. (CCH) at 77,188; *Sokol v. University Hospital, Inc.*, 402 F. Supp. 1029, 1030 (D. Mass. 1975).

In support of its conspiracy conclusion, the court of appeals relied upon several "cooperative venture" cases, including *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Associated Press v. United States*, 326 U.S. 1 (1945). *See Weiss*, 745 F.2d at 815-16. (Appendix A, *infra* pp. A-59 to A-61). The cooperative venture cases, however, are inapposite to this case.

These cases involve "cooperative ventures among otherwise competing entities" with "disparate objectives" organized to foster the separate economic interests of the individual members rather than the interests of a common single enterprise. *See Associated Press*, 326 U.S. at 15. In contrast, medical staffs are not organized to advance the individual competitive positions of their members; medical staffs are organized pursuant to federal and state law to serve the interests of the hospital and its patient population. *See supra* pp. 7-9.[25]

---

25. In addition, the members of the medical staff have different medical specialties (*e.g.*, surgery, family practice, radiology, obstetrics and gynecology) and, contrary to what the court of appeals assumed, physicians in different specialties do not compete against each other for patients. Indeed, because general practitioners are a prime source of patient referrals, it is in the economic interest of certain specialists who depend largely upon patient referrals (*e.g.*, radiologists) for there to be as many general practitioners (such as Weiss) on the medical staff as possible. *See* Robert Wood Johnson Foundation, *Medical Practice in the United States* (1981); 5092a-5097a.

Also, unlike the cooperative ventures relied upon by the court of appeals, medical staffs are organized to accomplish societally beneficial purposes that cannot be achieved except through concerted action. *Cf.* Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1, 21-22 (1983) (arguing that a business composed of multiple entities is a single enterprise incapable of Sherman Act section 1 concerted action when it produces a product that its component entities are incapable of producing alone). Moreover, one of the critical underpinnings of the cooperative venture cases — that the members' *voluntary agreement* to join the organization removes the necessity of an express finding of agreement when the organization acts — is wholly lacking for medical staffs, whose existence, functions, and membership are required by law.[26]

2. Credentialing decisions are made unilaterally by hospital boards of directors.

Even assuming *arguendo* that the York Medical Staff could be deemed a "combination," there is still no "concerted action" in this case. The record is uncontradicted that it was York Hospital (through its Board of Directors) that was the decision maker

---

26. The legally mandated existence and functions of the York Medical Staff under Pennsylvania law, *see* Pa. Stat. Ann. tit. 63, §§ 425.1-425.4 (Purdon Supp. 1984) (Peer Review Protection Act); 28 Pa. Code pt. IV (1984) (hospital and medical staff regulations) (excerpted in Appendix I, *infra* pp. A-152 to A-162), suggest an independent ground for reversing the court of appeals' finding of liability against the York Medical Staff — application of the state action doctrine. Under decisions of this Court, even plainly anticompetitive conduct undertaken pursuant to a "clearly articulated and affirmatively expressed state policy," which policy is "actively supervised" by the state, is *exempt* from antitrust scrutiny. *E.g.*, *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). In fact, the Seventh Circuit has concluded that the state action doctrine bars federal antitrust scrutiny of hospital staff privileges decisions when there is a comprehensive state system in place to regulate such decisions. *Marrese*, 748 F.2d at 387-95.

in the staff privileges process (as required by law).[27] In light of the jury's unequivocal finding that the decision maker (York Hospital) did not conspire with anyone, the concerted action requirement of Sherman Act section 1 cannot be satisfied. *Monsanto Co.*, 104 S. Ct. at 1469-71; *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-11 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

B. The decision of the court of appeals to apply a per se rule to a hospital's credentialing process is contrary to decisions of this Court and other courts of appeals.

The court of appeals also concluded that the staff privileges activities in this case should be subjected to a per se analysis because they were the equivalent of a "concerted refusal to deal" or "group boycott." *Weiss*, 745 F.2d at 818. (Appendix A, *infra* p. A-67). In so extending the per se rule, the court of appeals failed to observe the standards required by this Court for the creation of a new per se rule.

As this Court has warned, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). Also, any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). This mandatory economic analysis is equally essential when extending an established per se rule into a new context. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

Morever, per se rules under the antitrust laws are reserved for conduct that is deemed to have only "pernicious effects" on competition without "any redeeming virtue." *E.g., Continental*

27. Although the York Medical Staff played an advisory role in the staff privileges process (1562a-1563a), there is no evidence that the York Hospital Board was not the decision maker or that the York Medical Staff controlled the Board's staff privileges decisions at York Hospital. *See infra* note 28.

T.V., Inc., 433 U.S. at 50 (citing *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

1. Credentialing activities are not group boycotts.

The court of appeals sought to justify its new per se rule by forcing the York Hospital staff privileges process into the pre-existing group boycott or refusal to deal paradigm, while recognizing that the facts of this case do not precisely fit into that mold. *Weiss*, 745 F.2d at 819-20. (Appendix A, *infra* p. A-69).

Actionable refusals to deal must involve proof that businesses at one level of the competitive chain (e.g., physicians) used the threat of a boycott to induce businesses at another level (e.g., a hospital) not to deal with the physicians' competitors. *See Weiss*, 745 F.2d at 819. (Appendix A, *infra* p. A-67). Here, there was no evidence that any allopathic physicians (let alone allopathic physicians who were actual competitors of any osteopathic applicant for staff privileges) coerced the Board of Directors of York Hospital into refusing to deal with osteopathic physicians.[28] *See id.* at 819. (Appendix A, *infra* p. A-68). Accordingly, application of the "group boycott" label is improper.

2. The court of appeals' new per se rule was unsupported by any economic analysis.

The court of appeals also neglected to undertake any analysis of any adverse economic effects of the purportedly illegal conduct. (Whether a finding of per se liability is justified without even minimum scrutiny of purpose and effect is one of the questions this Court will review in *Northwest Wholesale Stationers, Inc.*) In the absence of such an analysis, this Court has repeatedly said it will not tolerate the creation of new per se rules or the extension of existing per se rules into new contexts.

28. Recognizing this, the court of appeals assumed that allopathic physicians have control over York Hospital's staff privileges decisions, which the court considered the functional equivalent of the coercion normally present in group boycott cases. *See Weiss*, 745 F.2d at 819 n.57, 819. (Appendix A, *infra* pp. A-67 to A-69). There is no evidence supporting this assumption and instead, the court was forced to rely upon two law review articles. *Id.* at 796 n.14, 819 n.57. (Appendix A, *infra* pp. A-15, A-67 to A-68).

Instead of engaging in any analysis of purpose or effect of the alleged discrimination, the court of appeals assumed that allopaths and osteopaths were like "retailers" and hospitals were like "manufacturers" and that, because a group boycott of one retailer by competing retailers and a manufacturer is "plainly anticompetitive," the same rule must apply in the hospital staff privileges context. *See Weiss*, 745 F.2d at 819-20. (Appendix A, *infra* pp. A-67 to A-70). The court made no attempt to determine whether the same pernicious, anticompetitive effects that led to a per se rule in retailer/manufacturer cases were present in the hospital staff privileges context.

This Court in *Broadcast Music, Inc.*, condemned a virtually identical analytic error by the Second Circuit, which had mechanistically extended the per se rule against price fixing to cover blanket licenses for copyrighted music:

> As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad.

Broadcast Music, Inc., 441 U.S. at 9. *See also National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948, 2959-62 (1984).

Had the court of appeals engaged in the economic analysis required by this Court, it would have found that there are substantial competitive differences between the health care industry (particularly a nonprofit hospital) and a retail business and that those differences compel rejection of the per se rule in the staff privileges context. For example, the significant economic distortions (which inherently reduce the level of "competition" in the health care industry) -- created, *inter alia*, by the prevalence of third-party reimbursement, by extensive government regulation, and by the control over consumer demand exercised by patients' physicians — distinguish the health care industry from

retail businesses. *See* Drake & Kozak, *A Primer on Antitrust and Hospital Regulation*, 3 J. of Health Pol., Pol'y & L. 328, 332-36 (1978); 3846a-3850a. This Court has already acknowledged the view that "the health care industry does not respond to classic marketplace forces" and that "[p]erhaps it makes little sense in such a context to entertain antitrust suits intended to promote or protect free competition." *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 392 (1981) (citing S. Rep. No. 93-1285, p. 39 (1974)).

Because of the competitive distinctiveness of the health care industry, a "literal" application of the "group boycott" label, without any economic analysis of the anticompetitive effects of adverse staff privileges decisions, is a fundamental error. As in *Broadcast Music, Inc.*, a reasoned analysis of the purpose and structure of the hospital credentialing process compels the conclusion that the pernicious, anticompetitive effects of group boycotts in the classic retailer/manufacturer cases are not present in the staff privileges context.

3. The existence of procompetitive justifications compels rejection of the per se standard.

The record demonstrates that the allegedly different standards applied to initial staff applications by osteopaths resulted from York Hospital's (and the York Medical Staff's) relative unfamiliarity with osteopathic training and references and the need to verify the credentials of all applicants to assure the highest quality of patient care at York Hospital. *See supra* pp. 4-5.

Moreover, York Hospital and the York Medical Staff offered additional explanations for the decision to deny Weiss's application for staff privileges — problems with Weiss's professional competence and character. Inexplicably, the court of appeals acknowledged the legitimacy of these justifications, but, after ruling that Weiss had established a per se violation of Sherman Act section 1 (thereby creating an entitlement to injunctive relief and attorneys' fees), the court went on to say that the procompetitive justifications could be raised only as defenses to Weiss's damage

claims.[29] *Weiss*, 745 F.2d at 820, 822, 831. (Appendix A, *infra* pp. A-70, A-74, A-96).

These justifications are sufficient to remove the case from the class of restraints that is per se illegal. As the Seventh Circuit held in its indistinguishable *Wilk* case, "the evidence of the 'patient care motive' required that rule of reason analysis be applied." *Wilk*, 719 F.2d at 221.

4. Credentialing activities are a form of industry self-regulation.

A medical staff's credentialing activities (including those in this case) should also be analyzed under the rule of reason because they are forms of industry self-regulation. This Court in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), established a test which, if met, compels rule of reason treatment, even of group boycotts, in an industry attempting to regulate itself.

The *Silver* test has three components: (i) There must be a mandate (legislative or otherwise) for self-regulation. (ii) The collective action must be consistent with the policy justifying self-regulation and no more extensive than necessary. (iii) The association making the decision must provide procedural safeguards. *See Northwest Wholesale Stationers, Inc.*, 715 F.2d at 1397; *Vuciecevic*, 572 F. Supp. at 1428.

Hospital staff privileges decisions satisfy all three of the *Silver* test's components and, therefore, must be analyzed under the rule of reason. *Vuciecevic*, 572 F. Supp. at 1428-29. *See also*

29. The court of appeals' relegation of these procompetitive justifications to the status of defenses in the damage phase of the antitrust trial is completely anomalous and unsupported by precedent. Assuming Weiss is shown to be unqualified for staff privileges, there can be no antitrust violation because the conduct is reasonable. Moreover, there can be no antitrust liability because there will be no causation between any alleged antitrust violation and any injury to Weiss. *See Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 169 (3d Cir. 1984). Accordingly, the court of appeals' decision to defer consideration of Weiss's qualifications to the damage phase creates antitrust liability (along with injunctive relief and concomitant contempt threats and attorneys' fees) in the absence of an unreasonable restraint of trade or any antitrust causation.

Drexel, *The Antitrust Implications of the Denial of Hospital Staff Privileges*, 36 U. Miami L. Rev. 207, 222-27 (1982).[30]

C. The decision of the court of appeals that there was a substantial and adverse effect on interstate commerce is in direct conflict with decisions of other courts of appeals and is unjustifiable on the record.

Section 1 of the Sherman Act proscribes only contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In this case, the court of appeals concluded that "York's [York Hospital's] business activities had a substantial effect on interstate commerce" and that the "interstate impact requirement" of Sherman Act section 1 was, accordingly, satisfied. *Weiss*, 745 F.2d at 824 n.65. (Appendix A, *infra* p. A-80).

By looking to York Hospital's general business activities (and not to the relationship between the particular activity challenged by Weiss and interstate commerce) to find the requisite inter-

30. Use of the rule of reason instead of the court of appeals' per se rule compels reversal of the court's finding of a violation of Sherman Act section 1. With respect to Weiss, the jury found that any conspiracy to deny Weiss staff privileges was not an unreasonable restraint of trade. Jury's Response to Special Verdict Question No. 8. (6244a).

With respect to the class, in footnote 61 of its opinion, the court of appeals stated that the conduct of the York Medical Staff violated section 1 of the Sherman Act, even under a rule of reason analysis, because it foreclosed from competitors an unreasonable amount of the market, citing footnote 51 of this Court's opinion in *Hyde*. *Weiss*, 745 F.2d at 821-22 n.61. (Appendix A, *supra* pp. A-74 to A-75). This gratuitous statement, which is another example of the unwillingness of the court of appeals to conduct any meaningful examination of the marketplace, is flatly contradicted by the jury's finding that the York Medical Staff had "no power" to exclude competitors. *Weiss*, 548 F. Supp. at 1052 (Finding of Fact No. 14). (Appendix B, *infra* p. A-100). Further, in *Hyde*, which involved an exclusive contract for staff privileges, this Court said quite clearly that a restraint is illegal only if it has a demonstrated effect on consumers. *Hyde*, 104 S. Ct. at 1568. *Accord National Collegiate Athletic Ass'n*, 104 S. Ct. at 2963-64; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-44 (1979); *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*, 682 F.2d 660, 663-65 (7th Cir. 1982). In this case, there is no evidence that the practices or policies of the York Medical Staff had any effect on consumers (whether on the prices charged to patients or otherwise).

state impact, the court of appeals' decision is in direct conflict with the decisions of five other circuits. Moreover, on this record, there is no evidence of *any* interstate impact caused by the York Medical Staff's allegedly illegal activities.

1. The circuit conflict.

After this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the circuits have split as to the application of the "affecting interstate commerce" test. The minority view, held by the Third and Ninth Circuits, is that the interstate commerce element is satisfied when *any* business activity of the defendant affects interstate commerce (the "general business activities test"). *See Weiss*, 745 F.2d at 824 n.65 (Appendix A, *infra* p. A-80);[31] *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

In direct conflict with this position is the analysis employed by the First, Second, Sixth, Eighth, and Tenth Circuits. Those courts have held that satisfaction of the interstate commerce element requires proof that the *particular* business activity challenged by plaintiff affects interstate commerce (the "infected activities test"). *See Hayden v. Bracy*, 744 F.2d 1338, 1343 (8th Cir. 1984); *McElhinney*, 1984-1 Trade Cas. (CCH) at 68,673-74; *Furlong v. Long Island College Hospital*, 710 F.2d 922, 925-26 (2d Cir. 1983); *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 44-45 (1st Cir. 1981); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 720-22 (10th Cir. 1981) (*en banc*).

The logic of the infected activities test, and the fact that it is the rule mandated by this Court's *McLain* decision, was explained by the Second Circuit as follows:

> We agree with the First and Tenth Circuits that it would not be prudent to extract from *McLain* a generalized rule that antitrust jurisdiction can be established simply by show-

31. Although there is language in the court of appeals' opinion that suggests ambivalence as to whether the Third Circuit is adopting the general business activities test, the court's application of the test leaves no doubt that it has embraced the Ninth Circuit's view. *See infra* note 32.

> ing that some aspects of a defendant's business have a relationship to interstate commerce. Rather the inquiry must be whether the defendant's activity that has allegedly been "infected" by unlawful conduct can be shown " 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *McLain*, *supra*, 444 U.S. at 246, 100 S. Ct. at 511, quoting *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 745, 96 S. Ct. 1848, 1852, 48 L. Ed. 2d 338 (1976).

Furlong, 710 F.2d at 926.

2. Absence of effect on interstate commerce.

There is a total absence of evidence on this record to establish the jurisdictional and substantive requirement of a "nexus" between any alleged antitrust violation and interstate commerce. Significantly, the interstate commerce issue is presented to this Court on the basis of a full factual record developed at trial; this Court, therefore, need not speculate as to what Weiss "may be able to show" at trial. *See McLain*, 444 U.S. at 246.

Weiss's evidence was that York Hospital made purchases in interstate commerce and received funds from third-party payors located outside Pennsylvania. *See Weiss*, 745 F.2d at 824 n.65. (Appendix A, *infra* pp. A-80 to A-81). There was never any evidence, however, to show, or from which a jury could infer, that the *Medical Staff's* "discrimination" against osteopaths (the only antitrust violation or "infection" found in this case) had any effect whatsoever on *Hospital* purchases in or receipts from interstate commerce.[32]

---

32. Even if the general business activities test could be invoked here, the interstate commerce jurisdictional requirement still would not be satisfied as against the only defendant found liable. As the court of appeals observed, the only evidence of interstate impact involved *York Hospital's* general business activities — there was no evidence of any *Medical Staff* involvement in or relationship to interstate commerce. *Weiss*, 745 F.2d at 824 n.65. (Appendix A, *infra* pp. A-80 to A-81).

The court of appeals attempted to sidestep this fatal defect by stating conclusorily and without authority that the absence of proof of York Medical Staff "activities in interstate commerce . . . is irrelevant because the medical staff does not exist independent of the hospital, and therefore the hospital's

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Dated: January 22, 1985

Frederic L. Ballard
Morris Cheston, Jr.
Arthur Makadon
Helen P. Pudlin*
David L. Cohen
BALLARD, SPAHR,
ANDREWS & INGERSOLL
30 South 17th Street
Philadelphia, PA 19103
(215) 564-1800

Attorneys for Petitioner
**Counsel of Record*

Of Counsel:
KOHN, SAVETT,
MARION & GRAF, P.C.
1700 Market Street
Philadelphia, PA 19103
(215) 665-9900

KAIN, BROWN & ROBERTS
119 East Market Street
York, PA 17401
(717) 843-8968

NOTES *(Continued)*

activities in interstate commerce are attributable to the medical staff also." *Weiss*, 745 F.2d at 825 n.66. (Appendix A, *infra* p. A-82). This conclusion is flawed in at least two respects.

First, it is incorrect that federal jurisdiction over a principal can be imputed to give a federal court jurisdiction over agents of that principal. *Cf. Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 906 (1st Cir. 1980). Second, insofar as Weiss and the court of appeals take the position that York Hospital and the York Medical Staff are a "single entity" for purposes of the interstate commerce requirement, but not for purposes of the concerted action requirement, they seek to have their cake and eat it too. Either York Hospital and its Medical Staff are a single entity (in which event there can be no concerted action) or they are not a single entity (in which event there is no jurisdiction).